

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID H. SMALL,

Petitioner,

v.

ORANGE COUNTY COURT,
PROSECUTORS OFFICE,

Respondent.

No. 18-CV-2716 (KMK)

ORDER ADOPTING
REPORT & RECOMMENDATION

KENNETH M. KARAS, United States District Judge:

Following a jury trial, pro se Petitioner David H. Small ("Petitioner") was convicted in the County Court, Orange County in the State of New York of burglary in the second degree, attempted rape in the first degree, and unlawful imprisonment in the second degree on July 23, 2008. (*See* Pet. for Writ of Habeas Corpus ("Pet."), at 1 (Dkt. No. 1).) *See also People v. Small*, 901 N.Y.S.2d 713 (App. Div. 2010). Petitioner was sentenced as a violent felony offender and received concurrent determinate prison terms of 12 years on the convictions of burglary and attempted rape, plus five years of post-release supervision, and one year on his unlawful imprisonment conviction. (Pet. 1; Order ("Apr. 11, 2019 Order"), at 2 (Dkt. No. 22).) The Appellate Division of the Second Department vacated Petitioner's attempted rape conviction but otherwise affirmed the judgment. (Pet. 1–2.) *See Small*, 901 N.Y.S.2d 713, *leave to appeal denied*, 16 N.Y.3d 800 (2011). The Court of Appeals subsequently denied leave to appeal that decision. (Pet. 3–4.) *See People v. Small*, 16 N.Y.3d 800 (2011). Thus, Plaintiff's conviction became final 90 days later, on May 23, 2011. *See McKinney v. Artuz*, 326 F.3d 87, 96 (2d Cir. 2003). On September 26, 2014, Petitioner filed a motion pursuant to New York Criminal Procedure Law §§ 440.10 and 440.20 in County Court, Orange County to vacate that court's July 23, 2008 judgment, as modified by the Second Department, or to set aside his sentence on the

burglary count. (Report and Recommendation (“R&R”), at 2 (Dkt. No. 25).) *See also People v. Small*, 56 N.Y.S.3d 875 (Mem) (App. Div. 2017). Petitioner’s motion was denied by the County Court, Orange County on April 6, 2016, and that order was affirmed by the Second Department on August 2, 2017. *Id.* The Court of Appeals denied leave to appeal. *People v. Small*, 30 N.Y.3d 1022 (2017).

Proceeding pro se, Petitioner filed a Petition for habeas corpus in this Court on March 27, 2018. (*See generally* Pet.) The matter was referred to the Honorable Lisa M. Smith (“Judge Smith”). (Dkt. No. 6.) On August 1, 2019, Judge Smith issued an R&R recommending that this Court deny the Petition in its entirety, finding that the Petition was time-barred and not subject to equitable tolling of the statute of limitations. (R&R 9.) Petitioner has not filed any objections to the R&R.¹

When no objections are filed, the Court reviews an R&R on a dispositive motion for clear error. *See Andrews v. LeClaire*, 709 F. Supp. 2d 269, 271 (S.D.N.Y. 2010); *Eisenberg v. New Eng. Motor Freight, Inc.*, 564 F. Supp. 2d 224, 226 (S.D.N.Y. 2008). The Court has reviewed the R&R and the Petition, and finding no substantive error, clear or otherwise, adopts the R&R.

Accordingly, it is hereby

ORDERED that the Report and Recommendation, dated August 1, 2019, is ADOPTED in its entirety.

ORDERED that the Petition is DISMISSED.

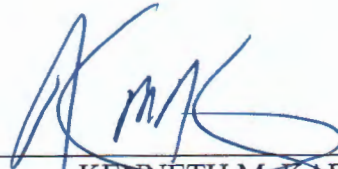
¹ Judge Smith provided notice that, pursuant to 28 U.S.C. § 636(b)(1) and Federal Rules of Civil Procedure 72(b) and 6(d), objections to the R&R were due within 14 days from the receipt of the R&R, or 17 days from the receipt of the same if the R&R was served upon the Parties by mail, and that the failure to object would constitute a waiver of Petitioner’s right to appeal. (R&R 9–10.)

ORDERED that because Petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue, *see* 28 U.S.C. § 2253(c)(2); *Lucidore v. N.Y. State Div. of Parole*, 209 F.3d 107, 111–12 (2d Cir. 2000), and the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this Order would not be taken in good faith. It is further

ORDERED that the Clerk of the Court is respectfully directed to close this case and to mail a copy of this Order to Petitioner.

SO ORDERED.

Dated: March S, 2020
White Plains, New York



KENNETH M. KARAS
United States District Judge